NO. 36530-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TYLER BAGBY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHITMAN COUNTY

BRIEF OF THE APPELLANT

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A. INTRODUCTION

Tyler Bagby was the only Black person at his trial, including the entire venire, the court, the litigants, and all but one of the testifying witnesses.

Throughout Mr. Bagby's trial, the prosecutor referred to the witnesses by race, three times asking witnesses about Mr. Bagby's "nationality." There was no reason to make this distinction. Courts have no place for biased behavior, whether it is intentional or implicit. The prosecutor's subtle but insidious misconduct tainted Mr. Bagby's trial and requires a reversal of his conviction.

This Court should also reverse Mr. Bagby's conviction because the court improperly instructed the jury on voluntary intoxication. The instruction given, based on the pattern jury instruction, is confusing and fails to instruct the jury on how voluntary intoxication negates intent properly. Because this error was not harmless beyond a reasonable doubt, it is a further basis for the reversal of Mr. Bagby's convictions.

B. ASSIGNMENTS OF ERROR

1. The prosecution committed incurable misconduct depriving Mr. Bagby of his right to a fair trial when it relied on racial descriptions and stereotypes to secure its convictions, in violation of the Fourteenth Amendment and Article I, Section 22.

2. The trial court erred when instructing the jury on voluntary intoxication. (Instruction No. 21).

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The devaluation and degradation of Black lives is a persistent and systemic injustice of the criminal legal system. Courts must be vigilant in eliminating racial bias, whether the acts are intentional or not. The use of the word "nationality" to distinguish a Black American from other witnesses is unacceptable. In Mr. Bagby's case, where identity was not an issue, the prosecution consistently asked witnesses to describe Mr. Bagby and the other witness's race, using the phrase "nationality" to refer to Mr. Bagby three times. The reliance on Mr. Bagby's race to distinguish him

from other witnesses was a subtle use of race to rely on the myth that Black men are more likely to commit crimes, especially against White persons. Does this misconduct require the reversal of Mr. Bagby's convictions?

2. When jury instructions read as a whole do not make legal standards evident to the jury, this Court will reverse a conviction. Voluntary intoxication is a defense that negates intent. However, the standard jury instruction informs the jury that "no act committed by a person while in the state of voluntarily intoxication is less criminal by a reason of that condition." It is only after informing the jury not to consider intoxication as negating criminality that the jury is instructed that "evidence of intoxication may be considered in determining whether the defendant acted with knowledge or intentionally." These contradictory statements are confusing and prevent the jury from understanding how to apply the voluntary intoxication instruction to a case. At Mr. Bagby's trial, ample evidence demonstrated his intoxication negated his ability to inform the intent for all the charged crimes. Had

the jury been provided with clear instruction on voluntary intoxication, it is likely they would have come to a different verdict. Because the government cannot demonstrate the confusing instruction was harmless beyond a reasonable doubt, is reversal of Mr. Bagby's conviction required?

D. STATEMENT OF THE CASE

Tyler Bagby is a Black American man. He was born in Stockton, California. 11/26-27/18 RP 220.[1] With his mother and siblings, he moved to Spokane. *Id.* After graduating from high school, Mr. Bagby left for college. He started in community college at Spokane Falls Community College. *Id.* at 222. He then transferred to Washington State University. *Id.* at 219. Mr. Bagby is a large man, at six feet and two hundred pounds. 11/27/18 RP 263. He enjoys exercising and working out on campus. 11/26-27/18 RP 223. At the time of trial, he was nine credits short of graduating. *Id.* at 219.

[1] The transcripts are not sequential and there are multiple transcripts for the same day. To reduce confusion, I have included the date range for each transcript volume.

About two weeks before the charged incident, Mr. Bagby started dating Kailah Crisostomo, a woman who attended the nearby University of Idaho, which is about 15 miles away from Pullman. 11/26-27/18 RP 222. On February 3, 2018, Mr. Bagby drove to Moscow, Idaho, to pick up Mr. Crisostomo so that they could hang out. *Id.* at 228. The two went to a concert with some of Mr. Bagby's friends. *Id.* at 229.

After the concert, Ms. Crisostomo and Mr. Bagby went back to Mr. Bagby's apartment, where they met up with several other people, including Shyla Roberson. 11/26-27/18 RP 230. Mr. Bagby contacted his friend Solomon Cooper, who played football for Washington State. *Id.* at 233. Between ten and eleven o'clock, the group left Mr. Bagby's apartment for a nearby fraternity house, where there was a party. *Id.*

Before leaving for the party, however, the friends consumed vodka shots. 11/26-27/18 RP 25. Although not everyone admitted to drinking the same amount, Mr. Bagby estimated he had between four to six shots. *Id.* at 230. Once they got to the party, Mr. Bagby and the others continued to

drink alcohol. Mr. Bagby thought he had between three to five beers at the party. *Id.* at 239.

While at the party, the friends got separated. 11/26-27/18 RP 27. At one point, Ms. Crisostomo left for the bathroom, leaving Mr. Bagby behind. *Id.* Mr. Bagby became concerned after she did not quickly return and asked Ms. Roberson to check on Ms. Crisostomo. *Id.* When Ms. Roberson did not come out of the bathroom, Mr. Bagby went to check on them in what was a converted co-ed bathroom. *Id.* at 241.

The two women were in a stall, with Ms. Crisostomo crying. 11/26-27/18 RP 28-9. Mr. Bagby became concerned and wanted to talk to Ms. Crisostomo. *Id.* at 241. Ms. Roberson encouraged him to leave. *Id.* at 32. After a while, Austin Davis, who was also in the bathroom, told Mr. Bagby to go. *Id.* at 59. Mr. Bagby thought Mr. Davis bumped him and felt threatened. *Id.* at 62. He punched Mr. Davis in the face, knocking him out. *Id.* at 62, 265. Mr. Bagby only remembered hitting Mr. Davis once, but other witnesses said he punched him more than one time. *Id.* at 246; 81. Around this time, Mr.

Cooper came to the bathroom. *Id.* at 116. He picked up Mr. Bagby, carried him out of the bathroom, and escorted him from the fraternity house. *Id.* at 117.

Mr. Bagby was not the only person drinking at the fraternity house. Mr. Davis thought he had consumed about eight to ten beers. 11/26-27/18 RP 53. Ms. Crisostomo had about three to five beers at the party after drinking vodka at Mr. Bagby's house. *Id.* at 239. Another witness thought she had about six beers. *Id.* at 101. Ms. Roberson testified she consumed much less than the other witnesses. *Id.* at 42.

Once outside the fraternity house, Mr. Bagby continued to be concerned about Ms. Crisostomo. He was also angry with Ms. Roberson for not letting him speak with Ms. Crisostomo. 11/26-27 RP 135. He tried to contact Ms. Roberson through social media apps and then tried calling her. *Id.* He ultimately left her a message where he made threats, expressing his anger. *Id.* at 140. At trial, Mr. Bagby stated he had no recollection of making the phone call, but believed he did after hearing it. *Id.* at 249.

Ms. Roberson and Ms. Crisostomo left for Ms. Roberson's apartment. Once there, Ms. Crisostomo passed out on the couch. 11/26/27/18 RP 141. Shortly afterward, Mr. Bagby arrived at the apartment. *Id.* Ms. Roberson alleged he broke down the door by kicking it in, although the jury would ultimately find him not guilty of this charge. *Id.* at 144. Once inside, Mr. Bagby tried to talk with Ms. Crisostomo, who left the living room to go to sleep in the bedroom. *Id.* The police arrived shortly afterward, arresting Mr. Bagby.

The government charged Mr. Bagby with residential burglary, assault in the fourth degree, malicious mischief, and harassment. CP 11-13. Mr. Bagby pled not guilty, and the case proceeded to trial.

Other than Mr. Cooper, Mr. Bagby was the only Black person at his trial. 11/16-26/18 RP 97. The entire jury pool, the judge, the lawyers, and all the remaining witnesses were white. *Id.*

Despite Mr. Bagby's identification not being at issue, the government asked most of the witnesses to describe Mr.

Bagby by his "nationality" or race. Three times, the prosecutor asked the witnesses to comment on Mr. Bagby's "nationality." 11/26-27/18 RP 79, 80, 94. When one of these witnesses did not understand what the prosecutor meant, he corrected himself and asked the witness to describe Mr. Bagby's race. *Id.* at 94. Many other times, the prosecution asked witnesses to differentiate Mr. Bagby from the other witnesses in his trial, based on his race. *See* 11/26-27/18 RP 33; 71; 72; 80; 80-81; 81; 86; 88; 95; 96; 97; 180.

Mr. Bagby testified to his intoxication. He admitted he had only vague memories of what happened that night. He had no memory of talking to Mr. Davis. 11/26-27/18 RP 242. He did not remember leaving the troubling message for Ms. Roberson. *Id.* at 249. He could not say much about what he did inside Mr. Roberson's apartment, other than that he did not kick in the door. *Id.* at 254. He told the jury he would not have committed any of the acts had he been sober. *Id.* at 250.

The government proposed an instruction on voluntary intoxication that the court used to instruct the jury. 11/27/18

RP 279. It stated that "No act committed by a person while in the state of voluntarily intoxication is less criminal by a reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with knowledge or intentionally." *Id.* at 302-03.

The jury found Mr. Bagby not guilty of malicious mischief. 11/26-27/18 RP 362. Mr. Bagby was found guilty of residential burglary, assault in the fourth degree, and harassment. *Id.*

E. ARGUMENT

This Court should reverse Mr. Bagby's convictions. During Mr. Bagby's trial, the prosecution unnecessarily alluded to Mr. Bagby's race, describing it as a "nationality" three times. Whether this misconduct was intentional is of no consequence. This Court should find that the use of race in a case where identity is not an issue tainted Mr. Bagby's trial and requires a reversal of his conviction.

This Court should also reverse Mr. Bagby's conviction because the court provided the jury with a confusing

instruction on voluntary intoxication. Before the court told the jury that intoxication may be considered in determining whether Mr. Bagby had the knowledge or intent to commit the charged acts, it was first told that no act committed Mr. Bagby while voluntarily intoxicated is less criminal because of his intoxication. This instruction is confusing and prevents the jury from properly applying the voluntary intoxication rule. Because this error is not harmless beyond a reasonable doubt, this Court should reverse Mr. Bagby's conviction.

1. **The subtle but consistent use of race and "nationality" in Mr. Bagby's trial by the prosecutor requires a reversal of Mr. Bagby's conviction.**

Mr. Bagby was the only Black person in the courtroom throughout his trial, other than one witness. Even though identity was not an issue, the prosecutor used the word "nationality" throughout Mr. Bagby's trial to highlight this difference. This incurable misconduct and requires a reversal of Mr. Bagby's conviction. U.S. Const. amend. XIV; Const. art. I, § 22.

a. Implicit and explicit racial bias in the criminal legal system devalues and degrades Black lives.

"The devaluation and degradation of black lives is not a recent event. It is a persistent and systemic injustice that predates this nation's founding." Washington Supreme Court, *Open Letter Calling on Judicial, Legal Community to Work Together on Racial Justice* (June 4, 2020).[2] The Court asked all of those involved in the legal system to "develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases" and "administer justice and support court rules in a way that brings greater racial justice to our system as a whole." *Id.*

Washington's criminal legal system is not immune to unconscious, implicit, racial bias. *State v. Walker*, 182 Wn.2d 463, 491, n.4, 341 P.3d 976, 991 (2015) (Gordon McCloud, J. concurring) (citing *State v. Saintcalle*, 178 Wn.2d 34, nn. 3-6, 309 P.3d 326 (2013)). Instead, our court recognizes that "bias pervades the entire legal system in general and hence

[2] Available on the Washington Court website at http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf

[minorities] do not trust the court system to resolve their disputes or administer justice evenhandedly." *Id.*, at 488 (quoting Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System* at 6 (2011) (alteration in original)[3] (quoting Wash. St. Minority & Justice Comm'n, 1990 *Final Report* at xxi (1990)).[4]

Implicit bias can be even more dangerous than explicit bias. Our courts recognize that "[i]mplicit racial bias can affect the fairness of a trial as much as, if not more than, 'blatant' racial bias." *State v. Berhe*, 193 Wn.2d 647, 663, 444 P.3d 1172 (2019) (citing *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011)); GR 37; *State v. Jefferson*, 192 Wn.2d 225, 240, 429 P.3d 467 (2018) (plurality opinion); *Saintcalle*, 178 Wn.2d at 49.

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[3] Available at http://www.law.washington.edu/About/RaceTaskPorce/preliminary_report_race_criminal_justice_030111.pdf.

[4] Available at http://www.courts.wa.gov/committee/pdf/TaskForce.pdf)

Racial bias requires reversal even when defense counsel does not object. In *State v. Monday*, the Supreme Court reversed the conviction where the prosecutor used racial terms to describe the behavior of the witnesses. 171 Wn.2d at 678. "Theories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial." *Id.* (citing *State v. Dhaliwal*, 150 Wn.2d 559, 583, 79 P.3d 432 (2003) (Chambers, J., concurring)).

b. The myth that Black men are violent and more likely to commit crimes than other people impacts how the criminal legal system treats Black men.

Social science affirms through empirical evidence the prevalence of negative attitudes towards Black people and the stereotype that they are violent and criminal. Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1128 (2012); *see also* Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton*

Trilogy Revisited, 21 Personality & Soc. Psychol. Bull. 1139 (1995).

Because these attitudes about Black men are likely to be implicit, they can function automatically, including in ways a person would not endorse as appropriate if they were consciously aware of the bias. Kang, at 1129. Bias towards persons of color is responsible for mass incarceration movements, such as the need to imprison the "new breed" of juvenile "super predators" and the war on drugs to prevent the horrors of "crack babies." Justin D. Levinson et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. Davis L. Rev. 839, 843 (2019). These biases persist. Even during a pandemic that has led to governments ordering citizens to wear face masks, many Black people fear that they will be profiled as dangerous if they wear them. Naomi Ishisaka, *Will Masks Be a Magnet for Racial Profiling? Coronavirus Directives Put Some Black People in Tough Spot*, Seattle Times (May 18, 2020).

The same biases are present in the criminal legal system. Bias impacts the way police interact with Black people. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 946, 976-77 (2002). It influences the charging and plea bargaining decisions of prosecutors. Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 Law & Soc'y Rev. 587, 615-19 (1985). Defense attorneys likewise interact with their clients of color differently than their White clients, as they tend to have biases similar to everyone else. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539, 1545-55 (2004). Even judges who are trained to compartmentalize information and transcend their own biases are not immune to implicit bias. Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. Rich. L. Rev. 1039, 1051 (2019).

Trials are no different. Kang, at 1143. Studies demonstrate that jurors of one race tend to show bias against

defendants of another race. *Id.* This bias influences both verdicts and sentencing. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 Law & Hum. Behav. 621, 627-28 (2005).

Perhaps surprisingly, the impact race has on a verdict is greater in cases that are not racially charged, such as this case. Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 Behav. Sci. & L. 599 (2009). In racially charged cases, jurors are more aware of the role race plays on their decision and try to avoid a racially influenced verdict. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 Psychol. Pub. Pol'y & L. 201, 255 (2001). Where race plays a more subtle role, jurors are not especially vigilant about the possibility of racial bias influencing their decision making. *Id.*

> Most of us would like to be free of biases, attitudes, and stereotypes that lead us to judge

> individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so.
>
> …
>
> Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.

Kang, at 1186 (2012).

Where bias, implicit or otherwise, is identified, reviewing courts will reverse. *Behre*, 193 Wn.2d at 663 ("[R]acial bias is a common and pervasive evil that causes systemic harm to the administration of justice."); *Monday*, 171 Wn.2d at 680 ("If justice is not equal for all, it is not justice."); *Jefferson*, 192 Wn.2d at 239 ("[P]urposeful race discrimination in the use of peremptory challenges violates the equal protection clause.").

"[T]rial courts must be vigilant in addressing the threat of explicit or implicit racial bias that affects a defendant's right to a fair trial." *State v. Quijas*, ___ Wn. App. 2d___, 457

P.3d 1241, 1248 (2020). Highlighting Mr. Bagby's race in a case where identity was not an issue raised the specter of bias. This Court should now reverse his convictions and order a new trial.

c. Using the word "nationality," the prosecutor consistently and unnecessarily distinguished Mr. Bagby from all other persons at his trial.

Mr. Bagby was the only Black man in the courtroom, other than one witness who played football at Washington State University. 11/16-26/18 RP 97; 11/26-27/18 RP 232. This included the entire venire panel, the court personnel, the lawyers, and all of the other witnesses. 11/16-26/18 RP 97.

Even though identity was not an issue, the prosecutor consistently required his witnesses to describe the race of the persons involved in the altercation, differentiating all of the witnesses from Mr. Bagby.

- <u>References to Mr. Bagby's "nationality"</u>

Three times, the prosecutor even used the word "nationality" to distinguish Mr. Bagby from other witnesses, first asking the following question:

> And the gentleman talking to the women in the stall trying to get his girlfriend out, what was his nationality?
>
> [Witness]: He was African American.

11/26-27/18 RP 79.

The prosecutor then used "nationality" to distinguish Mr. Bagby from others with the following question:

> Now the record reflects she identified the defendant, and then the gentleman that came up to talk to him, what was his nationality?
>
> A: He looked white.

11/26-27/18 RP 80.

The prosecutor repeated the use of the phrase "nationality" with another witness:

> Did you ever pay attention to his nationality or anything else?
>
> A: No.

11/26-27/18 RP 94.

When the prosecutor did not get the answer he expected, he asked the question again, substituting "ethnicity" for "nationality."

> Q: Ethnicity, sorry.

A: He was black, I think.

Id.

- Distinguishing Mr. Bagby by race.

With almost every witness, the prosecutor distinguished Mr. Bagby by his race. The prosecutor asked the questions listed below with the following answers, highlighting Mr. Bagby's race.

Q: Okay. White, black, Latino?

A: White.

11/26-27/18 RP 33.

Q. Were they African American, or were they white?

A: I believe they were African American.

11/26-27/18 RP 71.

Q. Were there any other black people in the bathroom?

A: I do not know that.

11/26-27/18 RP 72.

> Q. All right, so, then you see these, then did you see the white guy talk with the black -- with the defendant here?
>
> A: Hmm hmmm. [Indicating yes]

11/26-27/18 RP 80.

> Q. What was the demeanor like of the white guy at this time?
>
> A: He was pretty calm, very causal, was kind of like hey bro, like you just need to leave.

11/26-27/18 RP 80-81.

> Q. And the defendant punched the white guy that was talking to him?
>
> A: Yes.);

11/26-27/18 RP 81.

> Q. Do you recall, you said you indicated that Mr. Bagby was there, okay, do you recall any other black guys in the bathroom at that time?
>
> A: At the time, no.

11/26-27/18 RP 86.

> Q. He was the only black guy in the bathroom?
>
> A: That I remember, yeah.

11/26-27/18 RP 88.

> Q. Did you recognize the ethnicity of that guy?
>
> A: He was white.

11/26-27/18 RP 95.

> Q. Is that the person that was talking to the African American man?

A: Yes.

11/26-27/18 RP 96.

Q. And again, we're talking, the white guy did not push touch to hit the black guy he was talking to?

A: Yes.

11/26-27/18 RP 97.

[Prosecutor]: What ethnicity was he?

[Witness]: White.

11/26-27/18 RP 180.

- Ties to stereotypes.

These references enabled the prosecutor to subtly tie his questions about Mr. Bagby's race directly to the stereotype that Black men are dangerous.

The prosecutor asked Ms. Roberson why she was scared of Mr. Bagby. 11/26-27/18 RP 33. Ms. Roberson said, "Well he's way bigger than me, and he goes to the gym and works out, like, if he -- I've known before that he has, like a temper and a rage, and he's started to shake it, and I started getting scared like what if he gets in." *Id.* At no time was there a suggestion Mr. Bagby tried to break into the stall. On the

contrary, evidence suggested he did not do anything other than push on the door, even when one of the women opened the door to look out. *Id.* at 59. This reference to Mr. Bagby' dangerousness reinforced the stereotype that he was more dangerous than everyone around him.

The prosecutor built on the stereotypes associated with Black men when cross-examining Mr. Bagby. In some of his first questions to Mr. Bagby, rather than focus on the facts of the case, the prosecutor asked Mr. Bagby about his dog. The prosecutor asked Mr. Bagby:

> [Prosecutor:] Still have your dog?
>
> MR. BAGBY: Yes, I do.
>
> [Prosecutor]: Love him?
>
> A: Of course.
>
> Q: Care about him deeply?
>
> A: Who has a dog for over a year and don't care about him? Yes, I do.
>
> Q: Unfortunately, some people; but I'm glad to hear you're not one of them, so okay.

11/27/18 RP 262.

This irrelevant cross-examination served no purpose other than to reinforce stereotypes about Black men, suggesting Mr. Bagby also mistreated his animals. Ann Linder, *The Black Man's Dog: The Social Context of Breed Specific Legislation*, 25 Animal L. 51, 57 (2018) (referencing Michael Vick).[5] Like other references to dangerousness, this subtle suggestion played on bias and was improper.

There was no need for the government to highlight Mr. Bagby's race. There was never a question Mr. Bagby was the person involved in the altercation at the fraternity party or his friend's house. He did not deny the acts, instead questioning his intent and whether what he did constituted a crime. Mr. Bagby asserted he was acting in self-defense when he got into the altercation at the frat house. He believed no crime occurred at his friend's house, as he was only concerned with the well-being of his friend visiting from the University of Idaho. Who committed the acts was never an issue, making

[5] Michael Vick is an ex-NFL football player who was imprisoned for dog fighting. https://web.archive.org/web/20071211120818/http://www.cnn.com/2007/US/law/12/10/vick.sentenced/index.html

the difference in race between Mr. Bagby and almost everyone else irrelevant.

d. The use of race and "nationality" by the prosecutor tainted Mr. Bagby's trial, requiring reversal of his conviction.

The government owed a duty to Mr. Bagby to see that his right to a constitutionally fair trial was not violated. *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). The government violates this right when it appeals to racial stereotypes or racial bias to achieve a conviction. *Monday*, 171 Wn.2d at 676; U.S. Const. amend. XIV; Const. art. I, § 22.

In *Monday*, Washington's Supreme Court held that the prosecutor's appeal to racial bias fatally undermined the right to an impartial jury. 171 Wn.2d at 681. In *Monday*, the prosecutor attempted to discredit Black witnesses by adopting an exaggerated pronunciation of "police" as "po-leese" and intimating, or outright stating, that these witnesses followed a "code" that dictated "black folk don't testify against black folk." *Id.* at 678-79. The court held this was prosecutorial misconduct incapable of remedy, stating:

> In this case, we cannot say beyond a reasonable doubt that the error did not contribute to the verdicts. The prosecutor's misconduct tainted nearly every lay witness's testimony. It planted the seed in the jury's mind that most of the witnesses were, at best, shading the truth to benefit the defendant.

Id. at 681.

In her concurrence, Justice Madsen argued that rather than engage in an unconvincing attempt to show the error was not harmless, the court should have instead held that the injection of racial discrimination "cannot be countenanced at all, not even to the extent of contemplating to any degree that error might be harmless." *Monday*, 171 Wn.2d at 682 (Madsen, J., concurring).

This opinion is consistent with other jurisdictions that have examined the issue. For example, the Second Circuit held that:

> To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended.

McFarland v. Smith, 611 F.2d 414, 417 (2d Cir.1979).

The Minnesota Supreme Court likewise held:

> In cases where race should be irrelevant, racial considerations, in particular, can affect a juror's impartiality and must be removed from courtroom proceedings to the fullest extent possible.

State v. Varner, 643 N.W.2d 298, 304 (Minn.2002).

As in those cases, the prosecutor's error by repeatedly using the word "nationality" and then referring to Mr. Bagby by his race was incurable misconduct. Highlighting Mr. Bagby's race highlighted the myth of his dangerousness, especially given his size. 11/27/18 RP 63. This emphasis diminished the possibility that the jury could determine whether he acted in self-defense when he punched Mr. Davis. This Court cannot be confident using the word "nationality" to describe Mr. Bagby was not code used to highlight his race. The prosecutor's acts and word choice played on the myth that Black men are more dangerous than others, thus improperly affecting the outcome of the trial.

Likewise, this Court cannot be confident the jury's verdict on the burglary charge was not affected by the prosecutor's language. Without the highlight on race, the jury may have found Mr. Bagby lacked the intent to commit a burglary. Importantly, the jury found Mr. Bagby did not commit the charged offense of malicious mischief for damaging the front door of the apartment. The jury could have also found Mr. Bagby had no intent to commit a crime once he entered the apartment.

Our courts have also identified the great difficulty in determining whether an act of racism is intentional or not. *Jefferson*, 192 Wn.2d at 229 (citing *Saintcalle*, 178 Wn.2d at 46); In announcing its new rule on jury strikes in *Jefferson* and adopting GR 37, Washington's Supreme Court recognized the "unintentional, institutional, [and] unconscious" bias that pervades the criminal legal system. *Id.* at 243. "[P]eople are rarely aware of the actual reasons for their discrimination." *Saintcalle*, 178 Wash.2d at 49, 309 P.3d 326. Even where the government does not believe its actions were discriminatory,

rules must be established to prevent the insidious taint caused by such discrimination. *Id.*; *see also, Jefferson*, 192 Wn.2d at 251.

Intentional or not, the use of race affects the fairness, integrity, and justness of the criminal legal system. *United States v. Cabrera*, 222 F.3d 590, 597 (9th Cir.2000) (where police referred to witnesses by the Cuban origin). It does not matter whether the prosecutor intended to highlight Mr. Bagby's race as an intentional appeal to bias. Nor does it matter that his use of the word "nationality" to describe Black persons was a mistake. Instead, the use of race and "nationality," where identity is not an issue, is an unacceptable appeal to the implicit bias of the jurors. As such, reversal is required.

2. The court's instruction on voluntary intoxication confused the jury, preventing them from properly considering how to apply Mr. Bagby's intoxication to his ability to form the intent to commit the charged crimes.

The government's requested voluntary intoxication instruction failed to adequately inform the jury that voluntary intoxication can negate the element of intent.

Because this error was not harmless beyond a reasonable doubt, this Court should reverse Mr. Bagby's convictions.

a. The confusing voluntary intoxication instruction offered by the government provided unclear instruction to the jury on how to evaluate Mr. Bagby's intoxication.

This Court reviews jury instructions errors de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Jury instructions are only proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *Id.* The jury instructions, when read as a whole, must make the applicable legal standard evident. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). When an incorrect standard and a correct standard are given that would leave the jury confused, reversal is required. *Id.* at 864-65.

Before deliberations, the trial court instructed the jury on voluntary intoxication. 11/27/18 RP 302-03. The court told the jury that:

> No act committed by a person while in the state of voluntarily intoxication is less criminal by a reason of that condition. However, evidence of

> intoxication may be considered in determining whether the defendant acted with knowledge or intentionally.

Id., CP 77 (Instruction No. 21).

This instruction is based on WPIC 18.10. The pattern voluntary intoxication instruction is taken from RCW 9A.16.090, which states:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

Like the involuntary intoxication statute, the pattern instruction on voluntary intoxication is internally inconsistent. It begins by stating that voluntary intoxication cannot make an act "less criminal." WPIC 18.10. This statement rules out the possibility that the intoxication can reduce the level of culpability in any way. Once the jury has been told that evidence of intoxication does not diminish culpability, only then is it told that "evidence of intoxication

may be considered in determining whether the defendant acted with intent or premeditation." *Id.*

At best, these contradictory statements leave jurors confused. The jurors might conclude the second sentence refers to involuntary intoxication or some other way of consuming alcohol unknowingly since the first sentence instructed the jury that voluntary intoxication does not reduce culpability. 11/27/18 RP 302-03. It is also possible these sentences, read together, left the jurors with a vague sense that considering intoxication is disfavored.

This problem is avoided with a clearer instruction on voluntary intoxication. And even though the statute is poorly worded, jury instructions based on it need not be. Our Supreme Court interpreted the statute in *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987). The Court explained that the prohibition on making an act "less criminal" meant that evidence of intoxication "cannot form the basis of an affirmative defense that essentially admits the crime but attempts to excuse or mitigate the actor's criminality."

Coates, 107 Wn.2d at 889. Rather, "evidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability." *Id.* The Court further explained that "[t]he State always has the burden of proving the defendant acted with the necessary culpable mental state." *Id.* at 890.

The interpretation in *Coates* is a sensible interpretation of the statute, but not one that would likely occur to jurors based on the instructions given in this case. Under the *Coates* analysis, there is no reason to quote the first clause of the statute to the jury. Its only purpose is to explain to the courts that voluntary intoxication is not an affirmative defense. With that established, the jurors need only be told that they may consider voluntary intoxication in assessing the defendant's mental state and that the government always bears the burden of proving the relevant mental state. That is precisely what an instruction omitting the first sentence would do. There is no need to tell the jurors that voluntary

intoxication cannot make conduct "less criminal." It is confusing and prevents the jurors from understanding how to discharge their duty.

Eliminating the first sentence of the voluntary intoxication instruction would have helped Mr. Bagby present a clear defense to the charged crimes. It is clear from the inconsistent verdicts, acquitting Mr. Bagby of malicious mischief but convicting him of the other offenses, that the jury struggled to understand how to apply the voluntary intoxication instruction. Mr. Bagby's intoxication caused him to misperceive the actions of others, causing him to act in a way he would not have done if he had not been intoxicated.

b. This error requires reversal.

A jury instruction that omits or misstates the law is deemed erroneous and requires reversal unless the record must demonstrate beyond a reasonable doubt that the verdict would have been the same without the error. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Because this

standard cannot be met here, and Mr. Bagby is entitled to a new and fair trial.

All of the crimes charged contained elements that might have been called in question, had the jury instruction not been confusing to the jurors. To prove residential burglary, the government had to prove Mr. Bagby had the intent to commit a crime against a person or property therein. RCW 9A.52.025(1). Assault in the fourth degree required proof of an "intentional touching or striking of another person that is harmful or offensive." *State v. Jarvis*, 160 Wn. App. 111, 119, 246 P.3d 1280 (2011); RCW 9A.36.041(1). Harassment required proof Mr. Bagby made a knowing threat. RCW 9A.46.020(1)(a).

It was also clear there was a factual question about whether Mr. Bagby's intoxication impaired his ability to form the requisite intent for these offenses. Mr. Bagby admitted to consuming a large amount of alcohol. Before he left his apartment for the fraternity party, he had between four to six shots of vodka. 11/26-27/18 RP 230. He kept drinking at the

fraternity house, drinking another three to five beers. *Id.* at 239. Mr. Bagby also admitted that his behavior was affected by his intoxication. Before trial, he had no memory of leaving a voice message for Ms. Roberson. *Id.* at 249. Mr. Bagby also testified he would never have gotten into a fight with Mr. Davis had he been sober. *Id.* He regretted both of these actions, which were not in his character, had he not been drinking. *Id.* at 250. This Court has recognized that intoxication or impairment is a factual question that can be proved by lay testimony. *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647, *review denied*, 104 Wn.2d 1026 (1985). Here, it was sufficient to warrant a clear instruction on voluntary intoxication.

There were also physical manifestations of intoxication that entitled Mr. Bagby to a clear intoxication instruction. *State v. Walters*, 162 Wn. App. 74, 83, 255 P.3d 835 (2011); *see also State v. Rice*, 102 Wn.2d 120, 122-23, 683 P.2d 199 (1984); *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982); *State v. Jones*, 95 Wn.2d 616, 622, 628 P.2d 472 (1981). Mr.

Bagby consumed large amounts of vodka and beer over a short time. He misperceived a nudge on his shoulder by Mr. Davis as a threat to his safety. 11/26-27/18 RP at 245. He had to be carried out of the fraternity house by his friend. *Id.* at 248. Mr. Bagby then left a phone message for his friend that he had no recollection of leaving. *Id.* at 249. He felt an unreasonable need to ensure that his friend was safe, going so far as to enter Ms. Roberson's apartment without her permission. *Id.* at 256. At best, Mr. Bagby had a vague memory of his actions that night, admitting that much of it was hazy. *Id.* at 249, 251, 254.

Mr. Bagby admitted to many of the charged acts but denied having the intent to commit them because of his intoxication. Had the jury been properly instructed on voluntary intoxication, without the sentence informing them that "no act committed by a person while in the state of voluntarily intoxication is less criminal by a reason of that condition," the jury might have understood how to properly apply Mr. Bagby's intoxication to the intent element of the

charged crimes. Because these elements were central to Mr. Bagby's defense, where he did not deny committing the offenses, this Court cannot say this error was harmless.

In Mr. Bagby's case, this Court cannot say that the jury instructions read as a whole made the applicable legal standard for voluntary intoxication evident. *Kyllo*, 166 Wn.2d at 864. Because it is likely the instruction would have left the jury confused about how to apply Mr. Bagby's intoxication to the facts of the case, reversal is required. *Id.* at 864-65.

F. CONCLUSION

Because the prosecution relied on race and "nationality" to convict Mr. Bagby, Mr. Bagby is entitled to a new trial. Also, the confusing voluntary intoxication instruction read to the jury made it unlikely the jury could apply the instruction to the facts of Mr. Bagby's case, warranting a new trial.

DATED this 6th day of July 2020.

Respectfully submitted,

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